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No. 81-1617

In the Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Petitioner,

vs.

RAYMOND J. PLACE

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RAYMOND J. PLACE IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits the seizure of personal luggage by law enforcement authorities when such seizure is warrantless and without probable cause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App. A, 1a-29a) is reported at 660 F.2d 44. The opinion of the district court (Pet.App. D, 34a-57a) is reported at 498 F.Supp. 1217.

JURISDICTION

The judgment of the court of appeals (Pet.App. B, 30a-31a), was entered on September 16, 1981. A petition for rehearing was denied on November 30, 1981 (Pet.App. C, 32a-33a). On January 20, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1982 (Pet.App. E, 58a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 17, 1979, Robertson McGavock, an officer of the Dade County Public Safety Department in Miami, Florida, was on assignment at Miami International Airport. (Tr. 8)[1] Officer McGavock was regularly assigned to Miami International Airport as a narcotics investigator. In an attempt to detect narcotics movement, Officer McGavock's duties included observing passenger movement on inbound and outbound airline flights. The National Airlines ticket counter was the site Officer McGavock selected to observe departing passengers on this date and it was at this site where he first observed the Defendant, Raymond Place. (Tr. 8-9)

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[1] "Tr." refers to the transcript of the suppression hearing

Officer McGavock was positioned in the line formed by unticketed passengers when Raymond Place took up a position immediately behind him in the queue. (Tr. 8-12) Although Officer McGavock had never seen or heard of Mr. Place and even though he had no information "as to anything regarding any subject" relating to Raymond Place, he directed his attention to Mr. Place when it appeared to him that Mr. Place was "scanning" the lobby area. (Tr. 10 & 64) After standing in line in front of Mr. Place for approximately five minutes, Officer McGavock left the ticket line and joined John Facchiano, one of the three other law enforcement officers comprising the team of which Robertson McGavock was a member this day. (Tr. 11) Once Officer McGavock left the ticket line he continued to observe Mr. Place from several locations until Mr. Place completed the purchase of his ticket. While Raymond Place was actually transacting his business with the airline ticket agent, Officer McGavock saw Mr. Place check two suitcases with name tags, purchase a ticket, and accept a ticket folder from the ticket agent with luggage claim stubs attached. Officer McGavock also watched the ticket agent indicate to Mr. Place the direction of concourse "F", the concourse utilized by National Airlines for its flights. (Tr. 11-14)

Once Raymond Place moved from the ticket counter area toward concourse "F", Officer McGavock moved to a position paralleling the baggage conveyor belt transporting Mr. Place's two checked suitcases. From this vantage point, Officer McGavock observed the suitcases and noted the baggage claim stubs indicated a destination of La Guardia International Airport. (Tr. 14-15) Once the two suitcases moved out of sight, Officer McGavock directed his team member, Officer Facchiano, to go to the baggage loading area to look at the name

tags on the two suitcases and determine what information they provided. Meanwhile, Officer McGavock continued to observe Mr. Place and watched him perform what the trial court identified as a "curious ballet." When Officer Facchiano returned from the baggage area he told McGavock the name on the suitcases was "Place . . . P-L-A-C-E." (Tr. 16-18) At this juncture, personal contact was made with Mr. Place as he waited his turn to pass through the departing passengers security gate for concourse "F". Officer McGavock admitted that at this point he had no knowledge of the Defendant being "involved in anything" and that contact was initiated because he *just had a feeling.* (Tr. 35) This feeling was based upon his observance of two "unusual" activities — "scanning the lobby and looking over his shoulder for an unusual length of time while walking through the lobby for a great distance." (Tr. 32)

Officer Facchiano made the first contact with Mr. Place while Robertson McGavock stationed himself approximately 20 feet away. Prior to joining Officer Facchiano, McGavock watched Facchiano produce and show his credentials to Mr. Place. (Tr. 19) Officer McGavock then joined them as they moved to a position out of the line for departing passengers. (Tr. 19) The personal contact with Mr. Place was for the purpose of conducting a "brief interview . . . to alleviate any of that suspicion we might have had." (Tr. 35) For the next several minutes, the officers asked Mr. Place his name and had him produce and hand over his airline ticket and his drivers license. (Tr. 36) The name given by Mr. Place, the name on the two suitcase name tags, and the name of the passenger indicated on the airline ticket corresponded without exception. (Tr. 37-38) The contents of Mr. Place's hand purse were also viewed by Officer McGavock as

Raymond Place looked inside it for identification. (Tr. 64) Additionally, Mr. Place gave the two officers permission to examine his checked suitcases, but the officers noted that there was less than five minutes until departure of Mr. Place's flight and therefore allowed Mr. Place to depart. (Tr. 22) Then, based upon Mr. Place's departing comment that he suspected the officers of being police officers when he saw them back in the lobby area, Officer McGavock rushed to the baggage loading area to get all the information he could from the two name tags on Mr. Place's suitcases. (Tr. 22-23)

When Officer McGavock arrived in the baggage area, he located the two suitcases and had 15-30 seconds to write down the identity information on the suitcase name tags. (Tr. 55) The information was identical in all respects except Officer McGavock testified one name tag had the street number 1865 while the other had the street number 1885. (Tr. 56) After taking steps to attach some significance to the address information, Officer McGavock communicated his suspicions about Mr. Place to Agent Gerard Whitmore of the Drug Enforcement Administration in New York. (Tr. 27)

Officer McGavock asked Agent Whitmore to meet National Airlines Flight No. 136 at La Guardia International Airport and to monitor Mr. Place's activities there and take "whatever action they might deem appropriate based on what I had told him." (Tr. 68) Officer McGavock told Agent Whitmore that he was basing his suspicions mainly on Mr. Place's actions in the lobby—staring and looking around closely at the people in the lobby and relating he had picked out 4 or 5 individuals as police officers. (Tr. 67)

2. At approximately 3:30 p.m. on August 17, 1979, Gerard Whitmore, an agent with the Drug Enforcement Administration, watched passengers deplane from National Airlines Flight No. 136 arriving at La Guardia International Airport from Miami. Agent Whitmore was accompanied by another agent, Alfredo Iglesias, who also surveilled passengers exiting this particular flight. (Tr. 75) Both Agent Whitmore and Agent Iglesias were specifically looking for a person previously described to them and identified for them as Raymond Place. (Tr. 76) The surveilling of this particular flight and the individual monitoring of Raymond Place's activities were the direct result of a telephone conversation between Agent Whitmore and Officer Robertson McGavock. (Tr. 104) In the telephone conversation between McGavock and Whitmore, Officer McGavock informed Agent Whitmore that a passenger identifying himself as Raymond Place was aboard National Flight No. 136. Agent Whitmore was also given a description of Raymond Place and was asked to meet Flight No. 136 when it arrived at La Guardia and to monitor Raymond Place when he deplaned. (Tr. 104-105) The basis for the request by Officer McGavock that Agent Whitmore meet Flight No. 136 and monitor Mr. Place's activities was Officer McGavock's suspicions aroused by Mr. Place's activities while at Miami International Airport prior to boarding Flight No. 136. Agent Whitmore had no previous knowledge of Raymond Place other than that he received from Officer McGavock. (Tr. 106) Agent Whitmore planned to observe Raymond Place and determine in his mind if Mr. Place was, indeed, acting suspicious. (Tr. 106)

Raymond Place was among the first 25 or 30 passengers deplaning Flight No. 136. (Tr. 106) Agent Whitmore observed Mr. Place "looking around, and

thought such activity was extremely unusual." (Tr. 108) However, Agent Whitmore admitted that had he not been specifically observing Mr. Place, his attention may not have been drawn to this particular passenger. (Tr. 109)

According to Agent Whitmore, surveillance of Mr. Place was not continuous, but was voluntarily broken off between the deplaning area and the baggage claim area. During this interim period when Mr. Place was not being surveilled, Agent Whitmore positioned himself outside the railing surrounding National Airlines baggage claim area. (Tr. 77) Shortly after taking up this position, Agent Whitmore observed Mr. Place approach the baggage claim area from the direction of an adjoining baggage claim area. Once Mr. Place arrived at the designated baggage claim area, Agent Whitmore continued to be suspicious because of Mr. Place's scanning of the area. (Tr. 77-78)

When National Airlines Flight No. 136 baggage began arriving, Raymond Place proceeded to collect his two suitcases as they appeared on the carrousel. (Tr. 78-79) Mr. Place then presented the security person with his baggage claim stubs and began to walk away from the National Airlines baggage area toward the TWA baggage area. (Tr. 79-80) Agents Whitmore and Iglesias exchanged glances and head nods and then proceeded to follow Mr. Place to TWA's baggage claim area. When Mr. Place reached the TWA baggage area, he placed a call on a direct-line limousine service telephone. (Tr. 83) The decision to approach Mr. Place for purposes of interviewing him was made by Agent Whitmore when he observed Raymond Place complete this limousine telephone call. (Tr. 83) Agent Whitmore testified that

the purpose of the interview was to have Mr. Place explain his suspicious activity. (Tr. 127)

When the investigatory stop was initiated Agent Whitmore produced his own credentials and identified himself as a federal narcotics agent to Mr. Place. Agent Whitmore testified that Mr. Place asked him "why we [Whitmore and Iglesias] had stopped him." (Tr. 84) In response to Mr. Place's question, Agent Whitmore informed him that information had been received from the Dade County Public Safety Department, and that "based on observations that Agent Iglesias and [Whitmore] had made at the airport, that [Whitmore] was under the belief that there was a possibility that he was carrying narcotics." (Tr. 84) Mr. Place was next asked whether the luggage he had with him belonged to him, and then he was asked to produce identification and his airline ticket. (Tr. 85) Mr. Place was never asked to explain why he was scanning the area or why he appeared to be nervous, even though the purpose of the interview was to allow him an opportunity to offer such an explanation. (Tr. 126-127) The airline ticket and the drivers license produced by Mr. Place confirmed the information already communicated to the agents by Officer McGavock. Indeed, Agent Iglesias ran a NCIC computer check utilizing the information provided by Mr. Place's drivers license and determined there was no basis for holding Mr. Place for further questioning. (Tr. 92)

The agents seized the two suitcases possessed by Mr. Place and acknowledged by Mr. Place to belong to him. This seizure was without the consent of Mr. Place. (Tr. 128) Agent Whitmore also admitted his intentions

to take custody of the two suitcases regardless of whether or not Mr. Place consented to the seizure. (Tr. 129)

3. The court of appeals was particularly disturbed by the "high-handed" procedure which Agents Whitmore and Iglesias utilized when seizing Mr. Place's luggage. (Pet.App. A, 18a-19a) The agents lied to Mr. Place by informing him that they were taking his luggage to a federal judge when, in fact, the agents were taking Mr. Place's personal effects to J.F.K. Airport, where they intended to subject the luggage to a so-called "sniff search" by a dog trained to detect controlled substances.

Also, the court of appeals was certainly aware in reaching its decision that other circuits, which had been called upon to determine the same legal issue, had relied upon this Court's decision in *United States v. Van Leeuwen*, 397 U.S. 249 (1970). However, the court of appeals likewise was aware that not only were the facts supporting this Court's decision in *Van Leeuwen* clearly distinguishable from the facts present in the case at hand, but also, was aware, and took effort to point out, that the cases emanating from the other circuits were factually distinguishable in several critical ways from Mr. Place's situation. (See Pet.App. A, 20a-21a)

In reversing the judgment of conviction, the court of appeals succinctly summarized its position by stating:

> It is simply not a 'temporary detention for investivative purposes' when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never

> disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment Right (*id.* at 21a).

ARGUMENT

1. The petitioner frames the holding of the court of appeals as follows:

> The court of appeals has held that the police may not detain . . . luggage temporarily for the purpose of pursuing a specific course of investigation calculated to confirm or dispell . . . suspicion; rather, the police must allow the individual to leave with his baggage, with the almost certain result that any contraband contained in the baggage will be distributed or destroyed. (Pet. 10-11).

The holding of the court of appeals is more accurately stated by quoting directly from the opinion:

> The pivotal question raised by this appeal is whether a warrantless government seizure of a person's effects for a substantial period of time upon reasonable suspicion but without probable cause violates his Fourth Amendment Rights. We hold that it does. (Pet.App. A at 1a-2a).

The petitioner further compounds its inaccurate assessment of the decision and opinion rendered by the

court of appeals by asserting that a direct conflict exists between the decision of the court of appeals in this case and the decisions of three other courts of appeals. The petitioner cites as authority for its position the decisions of *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981), *United States v. Viegas*, 639 F.2d 42, cert. denied, No. 80-1344 (May 4, 1981), and *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980). Any support for its position which the petitioner seeks to invoke by asserting the existence of a conflict between the decision of the court of appeals in this case and the decisions of three other courts of appeals, does not withstand thoughtful examination. Indeed, the court of appeals below carefully examines the decisions rendered in *United States v. Viegas, supra*, and *United States v. Klein, supra*, and determines that the intrusions into constitutionally protected areas which were presented for determination in those cases did not approximate the seriousness of the intrusion presented by the facts of this case. (See Pet.App. A, 20a-21a) The court of appeals below specifically distinguishes the facts in the case at hand by pointing out that in none of the other cases emanating from other circuits does it appear:

> (1) That the detention of the baggage for investigation lasted for as long a period of time as in the present case,
>
> (2) That the baggage was removed from the airport to another location without the passenger's consent,
>
> (3) That the agents concealed their plans for investigation of the baggage, or,

(4) That they indicated that the baggage detention would be of indefinite duration. (Pet.App. at 21a)

Not unexpectedly, the petitioner now seeks to create conflict between the circuits on the issue at hand where no such conflict exists. The courts of appeal are themselves aware that decisions reaching the question presented by this case may well be decided through the application of Fourth Amendment principles on a case-by-case basis. Compare *United States v. O'Connor*, 658 F.2d 688 (9th Cir. 1981) and *United States v. Martell*, *supra*.

2. The petitioner also argues that the decision of the court of appeals below ". . . incorrectly analyzes certain broad principles of the Fourth Amendment law". The petitioner takes issue with the suggestion, that in the absence of exceptional circumstances, the same Fourth Amendment standards apply to both seizures and to searches. In support of its attack on the court of appeals below, the petitioner relies heavily on this Court's decision in *United States v. Van Leeuwen*, *supra*, a decision in which this Court specifically limited its decision to the facts presented by that case. Indeed, since the rendering of this Court's decision in *Van Leeuwen* more than a decade ago, this Court has not cited *Van Leeuwen* as authority for the position which the petitioner now urges this Court to adopt.

Next, the petitioner further attempts to obscure the subtle distinctions that exist between searches and seizures because of certain well-defined, and jealously-guarded, exceptions to the Fourth Amendment's requirements. The petitioner's unilateral attempt to expand such "exceptions" to the general principles of

the Fourth Amendment and thereby impute error to the court of appeals' decision must fail, since even in the decisions of *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Chadwick*, 433 U.S. 1 (1977), which petitioner cites as support for its position, the seizures of the items of personalty were based upon the existence of probable cause.

The decision of the court of appeals in the case at hand is well-reasoned, compatible with the decisions of other courts of appeals, and is constitutionally sound.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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